Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

v.

KENNETH THOMPSON,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. IS THE DEFENDANT ENTILTLED TO A REMAND FOR AN EVIDENTIARY HEARING PURSUANT TO THIS COURT'S RULING IN RULING IN MICHIGAN V. FISHER, PER CURIAM (NO. 09-91, 2009)

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STATEMENT OF THE CASE

On November 24, 2006, the Co-Defendant Romel Bolger was shot and grievously wounded while in the driveway adjacent to the 1000 block of Levick Street in Northeast Philadelphia. (7A) Thereafter, the Defendant and co-defendants Kenneth Thompson and Latoya Johnson Kirkland were arrested and charged with Criminal Conspiracy and various Drug Offenses. The Defendant was charged in the United States District Court for the Eastern District of Pennsylvania and the case was assigned to the Honorable Timothy Savage. (6A)

The Defendant filed a Motion to Suppress the evidence that was seized inside 1053 Levick Street as the result of a warrantless search and seizure. The Motion was heard on November 8, 2007, and was thereafter denied by Judge Savage. (9A) A jury was selected and the Defendant and co-defendants then went to trial. Evidence commenced on January 3, 2008 and the verdict was returned on January 10, 2008, with the Defendant being found guilty on Count Three, Possession with Intent to Distribute Cocaine, and on Count Four, Possession with Intent to Distribute Cocaine Base ("Crack"). The jury found the Defendant not guilty on Count One, Criminal Conspiracy; Count Two, Managing a Drug House and

on Count Five, Possession of a Gun in Furtherance of a Drug Crime. Thereafter the Defendant with counsel again appeared before Judge Savage on April 23, 2008. At that time the Court sentenced the Defendant to a term of 110 months in Federal Prison and to five (5) years on supervised Release Thereafter a timely Notice of Appeal was filed.

On November 24, 2006, someone opened fire upon this Defendant and wounded him causing him to be taken to a local hospital. Police came to the scene which was the driveway area that serviced the rear entries on the 1000 block of Levick Street in Northeast Philadelphia. (7A) Thereafter the police made a warrantless entry into 1053 Levick Street and found drugs including cocaine, cocaine base and a some marijuana. At the hospital, police went through the clothing of the Defendant and found one jar with marijuana in it. The Defendant's fingerprints were found on a scale, a sneaker bag and on a drinking glass inside the kitchen of 1053 Levick Street.

Police Officer Erbele responded to a radio call and found the wounded Defendant on the center median strip near Levick Street and Summerdale Avenue on November 24, 2006, at about 6:40 p.m. (7A) Officer Erbele traveled to the nearby driveway on the 1000 block of Levick Street and found evidence of a shooting including a .9 millimeter gun. A decision was made to enter the house located at 1053 Levick Street, Philadelphia, Pa. Upon entry, a gun was

found on the floor of the first floor by the front door and white powder was found in the middle bedroom

Police Officer Bowes arrived at the driveway where four black males were standing and found a gun nearby. Officer Bowes traveled to Frankford Hospital and saw the Defendant and went into the Defendant's clothing bag and found a jar of marijuana with the jar having a butterfly on the lid. There was no cocaine on the person of the Defendant or in his clothing and he had no weapons.

Officer Erbele observed an SUV in the driveway of 1053 Levick. Civilian Stacy Hummell lived nearby, heard gunshots and saw two black males running through the driveway. She said that the SUV had its door open and a boy was in the car and she then observed a man come and retrieve the boy. Toni Corley testified that co-defendant Thompson was the father of her six year-old and that the boy was with the co-defendant on Thanksgiving Day 2006 which was the time frame in question. Police Officer Hunter entered the property and looked in areas where a "body" might be found. Instead drugs were found.

Police Officer Galazka noted that over $176,000.00 was found in the house and that an identification card belonging to co-defendant Thompson together with other proof of residency relating to Latoya Kirkland were found in the house as well. A mini DVD from the SUV was found with the executive producer being one "Big Hommie". Other evidence identified

Big Hommie as the Defendant Bolger. Detective Casee found further proof of residency for co-defendants Kirkland and Thompson. Sgt. Schickel dusted for prints. Clifford Parson, a civilian employee of the Philadelphia Police Department testified that the Defendant's prints were found on a scale, a sneaker bag and on a drinking glass in the kitchen. Prints from co-defendant Thompson and from one Carol Wyatt were also found. However, Mr. Parson also noted that seven fingerprints could not be identified to anyone, and that the Defendant's prints were found on only one scale and that Mr. Parson did not know if the Defendant touched the scale inside of 1053 Levick Street.

Brenda Kirkland was the Aunt to co-defendant Latoya Kirkland and testified as to Latoya's rental of 1053 Levick Street.

Brenda Kirkland also noted that her cousin Kenny, the co-defendant Thompson moved in as well. She identified the Defendant as "Hommie" and said that he was friends with co-defendant Thompson and that the Defendant knew Latoya Kirkland as well. Mildred Wyatt said that Carol Wyatt was her sister and that the Defendant Bolger was the boyfriend of Carol Wyatt.

REASON FOR GRANTING THE WRIT

Defendant is entitled to a remand to the District Court regarding the exigent circumstances present during the search of the residence at 1037 Levick Street, Philadelphia, PA in light of the Court's ruling in Michigan v. Fisher, per curiam (No. 09-91, 2009)

In Michigan v. Fisher, the Supreme Court reaffirmed the that exigent circumstances, such as the "emergency aid exception" to the warrant requirement of the Fourth Amendment to the United States Constitution, will justify entry into a home without a warrant. In interpreting this exception, the Court cited to its seminal case of Brigham City v. Stuart, 547 U.S. 398 (2006).

In Brigham City v. Stuart, 547 U.S. 398 (2006), police officers responded to a noise complaint in the early morning hours. As they approached the house, the officers heard an altercation from inside of the house. The officers thought it was some kind of fight. The officers then observed an actual fight through the window. The Court found it "'plainly reasonable' for the officers to enter the house and quell the violence, for they had 'an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.'" Michigan v. Fisher, per curiam (No. 09-91, 2009) quoting Brigham City v. Stuart, 547 U.S. 398 (2006).

Similarly, in Michigan v. Fisher, the officers actually witnessed Fisher, inside of the house, screaming and throwing things. The back door was locked, and a couch was blocking the front door. The officers noticed a cut on Fisher's hand. The officers also noticed a pickup truck in the driveway with its front smashed, damaged fence posts, three broken windows on the house, with glass outside, and blood on the hood of the pickup truck and on clothes inside of it. Based on Brigham City v. Stuart, 547 U.S. 398 (2006) and those facts, the Court held that a warrantless entry would be reasonable under Fourth Amendment standards.

CONCLUSION

In the present case, there are no such facts, and therefore the Third Circuit Court of Appeals' reliance on Brigham City v. Stuart, 547 U.S. 398 (2006) is misplaced, especially in light of Michigan v. Fisher, per curiam (No. 09-91, 2009)

Respectfully submitted

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APPENDIX

APPENDIX A – JUDGMENT, FILED DECEMBER 18, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2214

UNITED STATES OF AMERICA

v.

KENNETH THOMPSON

a/k/a KR

a/k/a Ken Rock

Kenneth Thompson,

Appellant

08-2215

UNITED STATES OF AMERICA

v.

ROMEL BOLGER,

a/k/a Damir Miller
a/ka/ Romez Bolger
a/k/a Charles Connor
a/k/a BH
a/k/a Big Hommie
a/k/a James McCarty

Romel Bolger,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Nos. 2-07-cr-00388-1, 2-07-cr-00388-3, 2-07-cr-00388-2)
District Judge: Honorable Timothy J. Savage

Before: SLOVITER, JORDAN and WEIS, Circuit Judges

JUDGMENT

The cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under LAR 34.19(a) on December 14, 2009.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the orders of the District Court entered December 28, 2007, and judgments of the District Court entered April 17, 2008 and April 24, 2008, be and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

Attest:

DATED: December 18, 2009 /s/ Marcia M. Waldron
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2214

UNITED STATES OF AMERICA

v.

KENNETH THOMPSON

a/k/a KR
a/k/a Ken Rock

Kenneth Thompson,

Appellant

08-2215

UNITED STATES OF AMERICA

v.

LATOYA JOHNSON KIRKLAND,
Appellant

08-2294

UNITED STATES OF AMERICA

v.

ROMEL BOLGER,

a/k/a Damir Miller
a/k/a Romez Bolger
a/k/a Charles Connor
a/k/a BH
a/k/a Big Hommie
a/k/a James McCarty

Romel Bolger,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Nos. 2-07-cr-00388-1, 2-07-cr-00388-3, 2-07-cr-00388-2)
District Judge: Honorable Timothy J. Savage

Submitted Under Third Circuit LAR 34.1(a)
December 14, 2009

Before: SLOVITER, JORDAN and WEIS,
Circuit Judges

(Filed: December 18, 2009)

OPINION

SLOVITER, *Circuit Judge.*

Romel Bolger, Latoya Kirkland, and Kenneth Thompson appeal the District Court's denial of their motion to suppress evidence, including numerous kilos of cocaine, used against them at trial; Bolger and Thompson appeal the sufficiency of the evidence upon which their convictions for possession with intent to distribute cocaine and cocaine base rest; and Bolger appeals to the District Court's enhancement of his Guidelines calculation for possessing a firearm in connection with a drug trafficking offense.

I.

Background

After shots were fired near the intersection of Levick Street and Summerdale Avenue in Philadelphia, police found Bolger on the median of Levick street, bleeding from the mouth and chest from a gunshot wound. In the nearby driveway of the house at 1053 Levick Street officers found a handgun, shell casings, and two cars with bullet holes, including a blue Ford Expedition with both front doors open.

Officers Barclay and Erbele interviewed a witness at the scene who, the government asserts, told them that there had been a shoot-out between two groups of men, after which someone involved may have pulled a child from the Expedition and then entered 1053 Levick Street. Those officers also saw lights on in 1053 Levick and heard water running inside. One officer knocked on the door to no response. Erbele and Barclay concluded that someone injured in the shoot-out might be inside and, approximately ten minutes later, Erbele called his supervisor, Lieutenant Mangini of the SWAT team.

Mangini, who arrived about fifteen to twenty minutes later, and Eberle decided that the known facts merited entry into the building and that there was

no time to secure a warrant. Within ten to fifteen minutes, the SWAT team was gathered, knocked on the door, announced their intent to check the "well-being" of the inhabitants loud enough that "everybody on [the] block [could] hear," and received no answer. App. at 202. SWAT knocked again, received no response, and entered the building.

Just inside the door, the officers found a loaded handgun. Deeper inside the house, they discovered two more guns, sixty-one kilograms of cocaine, several bags of crack cocaine, and approximately $176,365. On one desk they found one "unwrapped" and two "wrapped" kilos of cocaine, at least one baggie with crack cocaine, a heat sealer with Thompson's fingerprints, ziplock bags, a gun placed on top of a newspaper dated November 22, 2006, a notebook that appeared to be a drug dealer, and a scale with Bolger's and Thompson's fingerprints.

Investigation revealed that both Thompson and Kirkland resided at 1053 Levick. Bolger, Thompson and Kirkland were indicted for conspiracy to possess with intent to distribute cocaine and cocaine base (Count I), and conspiracy and aiding and abetting a conspiracy to maintain a house for the purposes of drug trafficking (Count II); Bolger and Thompson were indicted for possession on or about November 25, 2006 with intent to distribute cocaine (Count III) and crack cocaine (Count IV) and with aiding and abetting those offenses, and with possession, and

aiding and abetting possession, of a weapon in furtherance of a drug trafficking crime (Count V); and Thompson was indicted as a convicted felon possessing a firearm (Count VI).

A. The Motions to suppress

The defendants all moved to suppress the evidence found in the house, arguing that the warrantless search was prohibited by the Fourth Amendment because it was unreasonable for the police to believe that an injured person might have been inside 1053 Levick. The District Court held a evidentiary hearing at which Barclay testified that a witness, later identified as James Antoine, had told him at the scene that he was standing near the driveway of 1053 Levick when some men walked past, after which he heard shooting and dove under his car; after the shooting stopped, he "saw a male run down the driveway with a gun, [then go] back to a vehicle which was parked in the rear of 1053 Levick, extract a small child, run back down the driveway eastbound and then run back westbound in the driveway...[and that] he thought he saw the male run into the house." App. at 169. Erbele testified that a witness he spoke to – also presumably Antoine – said that he saw "a male holding a child, a small child...running around up by where [Antoine's] car was...and...that he said he thought he saw somebody going into [1053 Levick]." App. at 147.

The District Court denied the motions to suppress, apparently because of the evidence of exigent circumstances. Defendants moved for reconsideration on the basis of a document subsequently produced by the government that contained a summary of an interview of Antoine taken the night of the incident by an Officer Casee which purportedly contradicted the testimony of Barclay and Erbele. The Court held a second hearing at which Antoine was questioned about what he had observed regarding persons entering the Levick Street house. At one point, Antoine stated, "I don't see nothing [from] where I stand, I can see nobody." App. at 268. Pressed to clarify whether he told the police that he "saw anybody go to the back door of the1053 Levick Street," Antoine answered, "I just say I don't remember the house number, like I say I don't remember who is in the house." App. at 269. The Court then asked, "Did you point to the house?", to which Antoine answered, "Yes, right there I see that in the back but I don't remember the house." App. at 269. The prosecution followed up by asking, "When you pointed to the house, you said you saw someone go to that door?", and Antoine answered, "I don't see someone go to the door, just argue back right here, the argument right here, that's all." App. at 269-70.

Erbele also testified, reiterating his former testimony but clarifying that, after speaking with Antoine the day of the shoot-out, he did not believe that Antoine knew where the man with the child went.

The District Court again denied the motions to supress and supplemented its fact-findings by stating: "Antoine saw a male with a small child go up the driveway, return to the rear of 1053 Levick Street and then proceed towards Summerdale Avenue...Antoine [later] informed a uniformed officer at the scene...what he had seen and heard....Antoine, a Hatian, speaks with a heavy accent and is difficult to understand...Sergeant Barclay understood Antoine to report that a person with a small child may have gone not the property at 1053 Levick Street....Barclay informed [Officer] Erbele what he believed Antoine had seen." Supp. App. at 93.

B. The trial and post-trial

A jury convicted Thompson of Counts I through IV; Bolger was convicted of Counts III and IV; and Kirkland was convicted of Count II. The District Court denied Bolger's motion for acquittal. At sentencing, the Court enhanced Bolger's Guidelines calculation by two points under U.S. Sentencing Guidelines § 2D1.1 (b)(1)(2007) for possessing a dangerous weapon in connection with a drug trafficking offense.

II.

Discussion[1]

A. Suppression

Defendants argue that the evidence should have been suppressed because of the absence of a warrant. Warrantless entry into a home is permitted "to assist persons who are seriously injured or threatened with such injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), but the government must show a reasonable basis, approximating probable cause, both for the officers' belief that an emergency exists and for linking the perceived emergency with the area or place into which they propose to intrude," *United States v. Martins*, 413 F.3d 139, 147 (1st Cir. 2005), *cert. denied*, 546 U.S. 1011 (2005). "We review the denial of a suppression motion for clear error as to the underlying facts, but exercise plenary review as to its legality in light of the district court's properly found facts." *United States v. Coles*, 437 F.3d 361, 365 (3d Cir. 2006). "The presence of exigent circumstances is a finding of fact, which we review for clear error." *Id.* at 366 (citation omitted).

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[1] The District Court had jurisdiction under 18 U.S.C. § 3231 and this court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The reviewing court must make an "objective assessment of an officer's actions in light of the facts and circumstances then known to him, *Scott v. United States*, 436 U.S. 128, 137 (1978), in the light of the totality of the circumstances confronting the officers, including...a need for an on-the-spot judgment based on incomplete information and sometimes ambiguous facts bearing upon the potential for serious consequences," *Martins*, 413 F.3d at 147. The government bears the burden of proving exigency. *Parkhurst v. Trapp*, 77 F.3d 707, 711 (3d Cir. 1996).

Defendants argue that the testimony given by Barclay and Erbele is "outrageously suspect" because it conflicts with Antoine's testimony and because the officers did not note that "someone went into the house with the child" as part of "there '49,' which is their formal Police Report." Appellants' Br. At 12-13. Defendants argue further that "even if [Antoine] said that he 'thought' [he saw someone go] into the house, ...[that is] still...not enough to establish probable cause or an exigent circumstance, "because "the man who took the child was in no way tied to the shooting in question," and there "was noting...to indicate that either the man or the child was hurt in any way...[including] no blood leading in or out of the home...or other noise that might indicate an emergency..." Appellants' Br. At 13. The Defendants also assert that there was no "imminence" to whatever danger existed because the police did not "rush[] into the home to save the child that they

feared might be coming to harm." Appellants' Brief at 19.

We reject these arguments. The District Court found that Antoine and Officers Barclay and Erbele were all credible witnesses, and explained that the discrepancies between the officers' testimony and Antoine's testimony were due the Officers' difficulty in understanding Antoine's Haitian accent. This was not clear error. Both Erbele and Casee testified that they found it difficult to understand Antoine, and a fair reading of his testimony supports the genuineness of those assertions. Adding to the possible confusion, Antoine pointed at 1053 Levick while speaking with Barclay and Erbele.

To be sure, there was some confusion between the officers and about what Antoine said, but this is unsurprising considering the interviews were conduction at the scene of a shoot-out. Barclay's testimony is of debatable relevance given that Erbele spoke with Antoine after Barclay and it was Mangini and Erbele who together made the decision to enter the house, apparently based primarily on the information provided by Erbele. Sill, Erbele had the following information: (1) there was a shoot-out; (2) a witness had said adjacent to the scene of the shoot-out; (3) that person may have taken a child from the bullet-ridden Expedition, or may have been involved in the shoot-out, or both; (4) a witness told Erbele that more than one person had exited the Expedition, which had both its front doors open; and (5)

there was water running in the house, the lights were on, and no one answered when the police knocked and announced their presence. These facts made the warrantless search reasonable.

Defendants' argument about the "49" – which does not appear in the record – is unconvincing. That document apparently reflects a statement by Erbele that a "male had taken a small child from the rear of a 2004 Expedition" and that "the male fled with the small child." App. at 158. That is not inconsistent with Erbele's belief that the male could have entered 1053 Levick. Moreover, neither Erbele nor Barclay created or reviewed the 49, and both claim that they told whoever wrote that document the same information to which they testified at the suppression hearing.

We also reject Defendants' argument that there was no exigency because the officers waited for the SWAT team. The time it took to collect information, call SWAT, decide to enter the building, then prepare to do so, was reasonable. It is well recognized that police officers can take "reasonable precautions to reduce the risk of serious injury to themselves or others..." *Causey v. City of Bay City*, 442 F.3d 524, 531 (6th Cir. 2006) (quoting *United States v. Salava*, 978 F.2d 320, 324 (7th Cir. 1992)). There was evidence that it was police procedure to wait for the SWAT team to enter a building when a armed person might be inside.

Defendants argue in the alternative that, even if the police were justified in entering the house, they were not justified in going past the entryway because "they could have called out" to see if anyone was hurt and because "there was no blood found; there was no loud noise nor screaming nor anything else that would have indicated that someone needed help." Appellants' Br. At 22. Defendants further assert that "the gun [found] on the floor' by the SWAT team "is immaterial" because "it is not against the law to have a gun in the home." Appellants' Br. At 22. The presence of the gun, however, increased the possibility that someone connected to the shoot-out was inside and in need of help, and the police had already "called out" before they entered the house and received no response. We will not disturb the District Court's denial of the motion to suppress.

B. Sufficiency of the evidence

In support of their contention that they were entitled to a judgment of acquittal, Bolger and Thompson argue that a reasonable jury could not have found beyond a reasonable doubt that they possessed the drugs recovered from 1053 Levick because "mere proximity to the drug, or mere presence on the property where it is located or mere association with the person who does not control the drug or the property, is insufficient to support a finding of possession," *United State v. Brown*, 3 F.3d 673, 680 (3d Cir. 1993) (citation omitted), and because the government "failed to demonstrate that [they] possessed any of

the drugs...on any date relevant to the prosecution," Appellants' Reply Br. At 21 (citing *United States v. Hall*, 473 F.3d 1295, 1309 (10th Cir. 2007) (reversing conviction for possession of crack because "[w]hile [the] evidence [might have been] sufficient to establish that [defendant] possessed crack-cocaine at some time, the indictment charged [defendant] with possession and distribution on or about April 7, 2001...[and] [n]one of [the] evidence shows that [defendant] possessed or distributed crack-cocaine at that time.")

There was, however, substantial evidence from which the jury could convict Thompson of constructive possession of cocaine and crack on or about November 25, 2006: Thompson admits, and there was ample evidence from which the jury could infer, that he resided at 1053 Levick Street where large amounts of drugs and drug paraphernalia were found in plain sight; Thompson's fingerprints were found on the scale and on the heat-sealer, which were next to kilos of cocaine; his fingerprints were also found on a drawer of that desk which contained a bag with a chunky white substance inside; there was evidence that those items had been placed there within a day of the shoot-out, including testimony by Brenda Kirkland, the aunt of Latoya Kirkland, that she had been in the apartment the day before the shoot-out, and had seen Thompson, but that the cocaine, gun, scale, etc., were not on the desk then; there was ample testimony that Thompson was pre

sent for the shoot-out and that it was he who retrieved his young son from the Expedition; and there was a "box of money" in the bedroom indentified as Thompson's.

There was also sufficient evidence to convict Bolger of aiding and abetting: four of his fingerprints were found on the recently-placed scale which, again, was next to an open package of drugs, baggies, and a heat sealer; Bolger was shot in the driveway outside 1053 Levick where, again, drugs were set-out in plain sight; three of his fingerprints were found on a glass in the kitchen near pots which seem to have been used in cooking crack cocaine; Bolger does not dispute that his street name was "Big Homie" and the notation "BH" in the notebook *cum* drug ledger was placed next to the number "1000" and the words "last run"; there were hundreds of phone calls placed between Bolger and Thompson, twelve of which were placed between November 22 and November 24; and there was substantial other evidence connecting Bolger with Thompson and with 1053 Levick. From this evidence, the jury could infer that Bolger had been helping, or was about to help, Thompson package drugs for sale. "Actual or constructive possession need not be shown to justify a conviction for aiding and abetting possession, only 'some affirmative participation which at least encourages the principal offender to commit the offense.'" *United States v. Frorup*, 963 F.2d 41, 43 (3d cir. 1992) (quoting

United States v. Raper, 676 F.2d 841, 850 (D.C. Cir. 1982)).

C. Bolger's sentencing enhancement

Bolger argues that the District Court erred in finding that he possessed a Springfield Armory Ultra handgun found in the driveway of 1053 Levick. We disagree. It is undisputed that Bolger was present in that driveway just before the gun was discovered by the police. Also, at Bolger's sentencing, the government called Agent Monahan who testified that the Springfield was traced to a man named Frost, who had purchased guns for Tull[2] who told Monahan that the had supplied a Springfield to Bolger. Tull also told Monahan that he remembered that gun because it had three holes in the trigger because it was all-metal and was therefore particularly heavy.

This evidence suffices to show that Bolger possessed the gun during the shoot-out in the driveway of 1053 Levick. "[T]his Court...review[s] factual findings relevant to the Guidelines for clear error and...exercise[s] plenary review over a district court's interpretation the of Guidelines." United States v. Grier, 475 F.3d 556, 570 (3d Cir. 2007) (en banc).

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[2] Tull had also testified during a hearing at trial that he had sold Bolger guns.

A District Court must apply a two-level Guidelines offense level increase if "a dangerous weapon (including a firearm) was possessed" in connection with a drug trafficking offense. U.S.S.G. § 2D1.1(b)(1)(2007). "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. 2D1.1 cmt. n.3 (2007). There is no such improbability here.

III.

Conclusion

For the above-stated reasons, we will affirm the orders of the District Court.

APPENDIX B – NOTICE OF APPEAL, DATED APRIL 14, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	: Criminal No. 07-CR-388-1
v.	:
KENNETH THOMPSON	

NOTICE OF APPEAL

Notice is hereby given that KENNETH THOMPSON, defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Sentence entered in this action on the 14th day of April, 2008, by the Honorable Timothy J. Savage, Judge, United States District Court for the Eastern District of Pennsylvania.

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APPENDIX C – JUDGMENT IN A CRIMINAL CASE, FILED APRIL 16, 2008

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
KENNETH THOMPSON

Case No. 07-388-01
USM Number: 62501-066
Edward Reif, Esq.

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s)_____
which was accepted by the court.

X was found guilty on count(s) One,Two,Three Four
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses.

Title & Section	Nature of Offense	Offense Ended	Count
21:846	Conspiracy to possess with intent to distribute cocaine and cocaine base (crack)	11/25/2006	1
21.856(a)(2)	Maintaining a house for drug trafficking.	11/25/2006	2

21.841(a)(1),(b)(1)(A)	Possession with intent to distribute controlled substances	11/25/2006	3
21 841(a)(1),(b)(1)(A)	Possession with intent to distribute controlled substances	11/25/2006	4

JUDGMENT IN A CRIMINAL CASE

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reforming Act of 1984.

X The defendant was found guilty on count(s) Five, Six

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for the district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 15, 2008
Date of Imposition of Judgment

/s/ Timothy Savage

Signature of Judge

Timothy J. Savage, USDJ
Name and Title of Judge

April 16, 2008
Date

Defendant: Kenneth Thompson
Case No.: CR. 07-388-01

IMPRISIONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Two hundred forty (240) months on each of Counts 1,2,3 and 4, to run concurrently.

X The court makes the following recommendations to the Bureau of Prisons:

(1) defendant shall receive credit for time served from December 4, 2006;(2) that the defendant received vocational training; (3) defendant shall be evaluated for and enrolled in a drug and alcohol treatment program; (4) designate defendant to FCI Fariton, Fairton, New Jersey.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Judgment executed as follows

Defendant delivered on _____to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy United States Marshal

Defendant: Kenneth Thompson

Case No.: CR. 07-388-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Ten (10) years on each of Counts 1, 3 and 4, and three (3) years on Count 2, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunitition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in a approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete

3) written report within the first five days of each month;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a

felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests to be performed at the time fixed by the Probation Office

2. The defendant shall pay a fine in the amount of $5,000.00.

3. The defendant shall pay to the United States a special assessment of $400.00, which shall be due immediately.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$5,000.00	$ 0

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to be the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss	Restitution Owed	Priority
Totals	$ 0	$ 0	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the X fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 400.00 due immediately, balance due

☐ no later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ____(e.g., weekly, monthly, quarterly) installments of $ _____over a period of _____(e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ _____over a period of _____(e.g., months or years), to commence_____(e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____(e.g., 30 or 60 days)

after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

See Preliminary Forfeiture Order dated April 9, 2008.

APPENDIX D – ORDER, DATED DECEMBER 27th, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

United States of America	:	Criminal
v.	:	No. 07-388-1 & 2
Romel Bolger	:	
and	:	
Kenneth Thompson	:	

ORDER

AND NOW, this 27th day of December, 2007, upon consideration of the Defendants Romel Bolger and Kenneth Thompson's Joint Motion for Reconsideration of the Court's Denial of Defendants' Motion to Suppress Evidence (Document No. 108), the Court having reconsidered its denial of the motions to suppress evidence and after an additional evidentiary hearing, it is **ORDERED** that the motions to suppress are **DENIED**.

/Timothy J. Savage
TIMOTHY J. SAVAGE, J.